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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 41.

PYRAMID MOTOR FREIGHT CORP.,

Petitioner,

—v.—

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS

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Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

Statement.

This appeal comes to this Court upon its order dated March 25, 1946 granting an application by the Petitioner for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court which partially reversed a final order and judg-

ment[1] of the United States District Court for the Southern District of New York, which dismissed the complaint in an action instituted by the Respondents against the Petitioner, to recover unpaid overtime wages under and pursuant to the provisions of the Fair Labor Standards act of 1938, c.676, 52 Stat. 1062, 29 U. S. C. A., Sec. 201 et seq. (hereinafter referred to as the Act).

The action was originally commenced in the City Court of the City of New York, but on the application of the Petitioner it was removed to the United States District Court which heard and finally decided the case solely upon an agreed statement of facts[2] (rec. 24-31).

The order dismissing the complaint (rec. 50-51) was filed on February 19, 1945 after which, the Respondents, on March 29, 1945, filed their Notice of Appeal to the Circuit

1. Prior to the entry of the order dismissing the complaint the District Court wrote an opinion (54 Fed. Sup. 565) which made no final disposition whatever of the action but merely suggested that the Respondents apply to the Interstate Commerce Commission for a ruling as to whether or not they belonged to a class of employees over whom the Commission exercised jurisdiction (rec. 34-39). Upon motion by Respondents for a final determination of the action (rec. 39-44) the District Court rendered an opinion (59 Fed. Supp. 341) upon which the order dismissing the complaint was entered.

2. The stipulated facts were substantially as follows: The petitioner was engaged in business as a common carrier of property for hire by motor vehicle in interstate commerce. It operated motor trucks between Wilmington, Delaware, Philadelphia, Pennsylvania and New York City, in which latter City it maintained a main terminal on West 11th Street and a sub-terminal on West 38th Street in the Garment District to and from which freight consigned and originating in that district was shipped and delivered. The Respondents were employed by Petitioner as push-cart boys, whose duties consisted of picking up in-bound freight at the Petitioner's sub-terminal (sometimes from the tail boards of the trucks) and delivering it by hand or hand-truck to the consignees or the recipients thereof located in the Garment District. In the late afternoons or early evenings freight consigned from the Garment District and intended for delivery outside of the State of New York was picked up by Respondents at the consignees' places of business and hand-trucked by them to the Petitioner's sub-terminal where other persons (drivers' helpers) loaded it into waiting trucks. Except in some instances where the weight or size of the packages required the Respondents to assist the drivers' helpers in placing them within the body of the trucks, the Respondents participation in loading operations was limited solely to lifting the packages to the tail board of the trucks from where they were removed and stacked into the body of the trucks by other persons.

Court of Appeals. Due to an unavoidable delay which counsel (on appeal) for the Respondents experienced in obtaining from the attorneys of Record the Record on Appeal, as well as to a misunderstanding which arose between them in regard thereto, the said Record was not filed and docketed in the Circuit Court within the time prescribed by Rule 73 g. of the Federal Rules of Civil Procedure. Thereafter and under date of July 20, 1945, the Circuit Court, upon application by Respondents, due and timely notice of which was given to Petitioner,[3] made and entered an order (rec. 53) enlarging and extending to September 1, 1945, the Respondents' time within which to file the said record.

The Petitioner did not oppose the application to enlarge the time, but waited until after the Record was filed and then moved the Circuit Court for an order dismissing the appeal on the ground that the Respondents had not complied with Rule 73 g. (rec. 54-62). After due deliberation, the Court denied the Petitioner's motion (rec. 63) which was again renewed by the Petitioner upon the argument of the appeal and again denied by the Circuit Court (rec. 65) which, by its order dated December 28, 1945, reversed the District Court and granted judgment in favor of all of the Respondents except Shapiro, with respect to whom the judgment of the District Court was affirmed.[4] (rec. 68-69).

Questions Presented.

Upon this record it would appear that there are only two questions presented by this appeal; namely, (1) were the respondents exempt from the benefits of the Act by reason of the fact that the Interstate Commerce Commission,

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3. The receipt of notice of the application for the extension of time within which to file the record was admitted by Petitioner at page 31 of its brief submitted in support of its petition to the Supreme Court for a writ of certiorari.

4. The opinion of the Circuit Court is reported at 152 Fed. 2d 619.

(hereinafter referred to as the Commission,) was vested with the power to regulate their qualifications and maximum hours of service?; and (2) did the petitioner, under its defense of exemption, sustain the burden of proof that the Respondents were in fact exempt from the benefits of the Act?.

Although it seems that these are the only issues which warrant any consideration whatever, the Petitioner also seeks to have this Court review the Circuit Court's action in denying, on two separate occasions, the motion to dismiss the appeal on the grounds stated. Such being the case, the first part of this brief is directed to a discussion of that point.

POINT I.

Under Rule 73(a) of the Federal Rules of Civil Procedure the Circuit Courts of Appeal are vested with the power to extend and enlarge the time within which to file a Record on Appeal, even though the ninety day period prescribed by Rule 73(g) has expired, and the Circuit Court of Appeals for the Second Circuit did not in this instance abuse its discretion in extending the respondents' time within which to file and docket the Record on Appeal.

It is extremely difficult, if not impossible, to reconcile the divergent views which the Petitioner has advanced as to the reason why the Circuit Court erred in denying the motion to dismiss the appeal. On the one hand the Petitioner states that the Circuit Court was without power to extend the respondents' time, and on the other, asserts that the Court abused its discretion in so doing. Obviously the two statements are diametrical for the simple reason that an accusation of an abuse of discretion must, by necessity,

admit to the power of the Court to function in the first instance whereas the lack of power to act in a given situation would not afford an opportunity for the Court to abuse its discretion.

In urging that the Circuit Court lacked power to grant the extension, the Petitioner evidently has become confused with respect to the meaning and interpretation which the Courts have given to Rule 73(a)[5] and 73(g)[6].

The power of the District Courts to grant extensions is governed wholly by Rule 73(g) which applies to the District Courts and to the District Courts alone, whereas the power of the Circuit Courts is derived from Rule 73(a) which unambiguously provides that the validity of an appeal is not affected by the failure to perfect it. Where the appeal has not been perfected within the time prescribed by Rule 73(g), the Circuit Court, under Rule 73(a), is vested with the power to do that which it "deems appropriate, which may include dismissal of the appeal." Thus, the wording of the Rule itself, particularly the last six words of the last sentence, clearly indicates that the Supreme

5. 73(a) HOW TAKEN. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

6. 73(g) DOCKETING AND RECORD ON APPEAL. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal.

Court, in promulgating the said Rules, intended that the Circuit Courts be vested with power to exercise their discretion in the matter of granting extensions and were not obliged to dismiss the appeal because it had not been perfected within the prescribed time. If the contrary were true, there would be no reason or explanation whatever for the language used, and this Court is not disposed or inclined to the use of words which are meaningless.

The precise question has been presented to other Circuit Courts on former occasions, and in each instance they have consistently applied a liberal construction and interpretation to Rule 73(a). In *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83, the Third Circuit, in denying a motion to dismiss an appeal for failure to file and docket the record within the prescribed time, said that it was clear that under the provisions of Rule 73(a) the failure of the appellant to file the Record in time did not invalidate the appeal but merely furnished the basis for such action as the Court deemed appropriate, which included the authority to permit the appeal to be filed either before or after the expiration of the ninety day period prescribed by Rule 73(g). Also in *Burke* v. *Caufield*, 111 F. 2d 526, in which the Chief Justice and Mr. Justice Rutledge of this Court participated, the Circuit Court of Appeals for the District of Columbia, by a unanimous opinion, held that although an order of the District Court extending the time within which to file the Record was invalid and of no force or effect by reason of the fact that it was made forty-five days after the Notice of Appeal was filed, the appellant's failure to file and docket the appeal within the time allotted by Rule 73(g) was not fatal because under Rule 73(a), the Circuit Court could exercise its discretion and allow the appeal to be filed even though the time within which to do so had expired.

The same conclusion was reached by the Sixth Circuit in *Mutual Benefit Health & Accident Assn.* v. *Snyder*, 109 F. 2d 469, and also by the *Ninth Circuit in U. S.* v. *Gallagher*, 151 F. 2d 556, where the Court, although expressing in no uncertain terms its power to enlarge the time, nevertheless dismissed the appeal because the Appellant offered no excuse whatever for its failure to file the Record or serve upon the Appellee a designation thereof as prescribed by Rule 75(d). The Petitioner refers to the cases above cited (p. 5 of Pet. brief) but contrary to the position which it took in its former brief submitted in support of the petition for certiorari, now claims that the action taken by the Courts in those cases is not in harmony with that taken by the Circuit Court in this instance. Here again we have inconsistency and indecision on the part of the Petitioner, and it is difficult to understand what interpretation, if any, it places upon the Rules mentioned. The language of Rule 73(a), as well as the judicial interpretation thereof, make it clear that the Circuit Courts have the power and authority to permit an appeal to be filed after the expiration of the ninety day period prescribed by Rule 73(g), but the Petitioner either disagrees with this view or is confused with respect to the authority vested in the District and Circuit Courts by the two rules. In either event the situation is unaltered insofar as the Circuit Court's power is concerned and the exercise of that power in this case did not constitute an abuse of judicial discretion. The Circuit Court had before it in affidavit form, all of the reasons why the appeal had not been perfected, and even though it later referred to the excuses as feeble, the court nevertheless considered them of sufficient merit to grant the application which it deemed quite appropriate under the circumstances. Aside from the fact that there is nothing to show that there was an abuse of discretion on the part of the Circuit Court,

there is absolutely nothing to show that the Petitioner was harmed by the granting of the extension and it does not even claim that it was harmed except in what the Petitioner terms its "right to repose", which not only is meaningless, but an obvious figment of the imagination.

POINT II.

The Petitioner's defense of the action on the ground that the Respondents were exempt from the benefits of the Act by reason of the fact that they belonged to a class of employees over whom the Commission had the power to exercise jurisdiction, imposed upon the Petitioner the burden of proving the exemption claimed, and the Petitioner failed to meet and carry such burden of proof in the Trial Court.

In view of the fact that the judgment of the Circuit Court was based primarily, if not wholly, upon the failure on the part of the Petitioner to meet the burden of proof imposed upon it by its affirmative defense of exemption, it seems that such determination, if in accord with the intent of the Statute and the weight of authority, would require affirmance by this Court and thus dispose of this appeal without the necessity of giving further consideration to any other questions which may be involved. With that in mind it is deemed expedient to discuss in the first instance, the question which was primarily considered by the Circuit Court and upon which its decision was based.

In the agreed statement of facts (rec. 24-31) the Petitioner admitted that the Respondents were engaged in the production of goods for interstate commerce within the meaning of the Act, and performed duties *the nature of which*, left no room for doubt that they were delivery boys pure and simple. In the mornings they received packages

from the tail board of incoming trucks and placed them in the Petitioner's sub-terminal, after which the Respondents hand-trucked the packages through the streets of the Garment District to the premises of the addressees and consignees. In the afternoons and evenings the Respondents picked up packages from the premises of various manufacturing concerns located in the Garment District and hand-trucked them to the sub-terminal or to the out-going trucks where the packages were loaded by persons (*drivers' helpers or loaders*) other than the Respondents. Except on some occasions where the weight and size of the packages required the Respondents to assist the loaders in stacking the packages within the body of the trucks, the Respondents participated in the loading operations only to the extent of *lifting the packages to the tail board of the trucks.* The Petitioner also admitted that the Respondents were entitled to recover overtime wages pursuant to the provisions of the Act unless they were exempt from its benefits by Section 13 (b) (1) thereof.

Except for the agreed statement of facts, there was no evidence of any kind before the Trial Court with respect to the nature of the Respondents' duties, neither was there any admission, concession or other statement regarding the Petitioner's affirmative defense other than a statement *that Petitioner claimed the exemption.*

Although the Petitioner's claim of exemption was wholly unsupported by the evidence or otherwise, the Trial Court, from the very outset, evinced a firm determination to deal with the controversy not on the basis of the facts presented and in the light of provisions of the Act and the numerous authorities construing it, but on a theory entirely of its own conception and uniquely without precedent. Proof of the fact that the Trial Court not only intended to but actually did completely disregard the rules of evidence insofar

as they pertain to the Petitioner's burden of proof, is found in that part of its second opinion,[7] wherein it stated:

> "This cause should, therefore, not be determined on the basis of the affirmative in the pleadings, nor the incidence of the burden of proof. Nor should a determination be based upon the question of whether a technical exemption is created by the statute as a result of which the proof of the fact that a plaintiff performs work which promotes the safety of the operation of the motor vehicles falls upon defendant" (rec. 48).

Aside from adopting what, to say the least, is a revolutionary view, the Trial Court further expanded its theory so as to impose upon the Respondents obligations which certainly were never intended by the Statute. In this respect the Court said:

> "No showing has been made to the court that plaintiffs were not employees for whom the Commission may have jurisdiction to prescribe maximum hours of service. There is no showing that the Commission has excluded plaintiffs, or the classes of employees to which each respectively belongs, from the circle of jurisdiction" (rec. 45).

In other words, the Court not only presupposed that the Respondents belonged to a particular class of employees, but said as well that they should have established that they were not under the jurisdiction of the Commission and did not come within the exemption provisions of the Act. To say that the views thus expressed by the Trial Court are revolutionary or unique is to put it mildly, because they

7. 59 Fed. Sup. 341.

represent a complete departure from what has always seemed to be a well established principle of law.

In adopting the Act, it was the intention of Congress to include within its protective features every employer and employee engaged in commerce and in the production of goods for interstate commerce. *Kirschbaum Co. v. Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88; *Helena Glendale Ferry Co. v. Walling*, 132 F. 2d 616; *Fleming v. Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Bowie v. Gonzalez*, 117 F. 2d 111; and since the Statute is remedial and by its terms includes every employer and employee coming within the broad scope of its coverage, the section granting exemptions is to be strictly construed against those claiming the exemptions. Plainly the defense of exemption in this case gave rise to a question of fact, and the burden of proving that fact was imposed wholly upon the Petitioner. *Helliwell et al. v. Haberman etc.*, 140 F. 2d 833; *Consolidated Timber v. Wormack*, 132 F. 2d 161; *Schmidtke v. Conesa*, 141 F. 2d 634; *Walling v. Sun Pub. Co.*, 140 F. 2d 445; *Farelli v. Gypsum*, 141 F. 2d 216; *Fletcher v. Grinell Bros.*, 150 F. 2d 337; *George Lawley & Son Corp. v. Smith*, 140 F. 2d 439.

Despite the abundance of authority on the subject, the Petitioner without reference to a single citation states (Pet. brief, p. 20) that: "the general rule regarding the burden of proof is that the required information must come from the person best able to furnish it." By this statement the Petitioner in effect says that inasmuch as it kept no records of the Respondents' employment and was not in a position to know the facts of its own defense, it was the duty and responsibility of the Respondents to disprove Petitioner's claim of exemption. In other words, the Petitioner says that by reason of the difficulty which it encountered it was not obliged to prove its defense. The opinion of this Court

in that regard was clearly expressed in *Anderson* v. *Mt. Clemens Pottery Co.*, 66 Sup. Ct. 1187, where attention was called to the fact that under Section 11(c) of the Act, it was the duty of the employer to keep proper records of wages, hours and other working conditions and practices, because it is the employer and not the employee who is in the "position to know and to produce the most probative facts concerning the nature and amount of the work performed". The view so expressed in the *Anderson* case would seem to settle the question as to who has the burden of proof and nullify the Petitioner's claim that the Circuit Court, in this case, usurped the administrative function of the Commission by concluding that the duties performed by the Respondents did not affect the safety of operation of the Petitioner's motor trucks. Although the Circuit Court could have passed upon that question[8] the opinion will indicate that it did not do so; it simply said that the Petitioner had failed to meet its burden of proof, and there was no determination one way or the other as to whether the whole or any part of the respondents' duties substantially affected safety of operation or whether a substantial part of their time was devoted to such duties.[9] The Court merely took the position that the Petitioner had offered no proof one way or the other, and it could not look to the Commission

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8. The Statutes involved do not indicate that Congress committed to the Commission solely the administrative duty of determining what kind of work affects safety of operation. *Shields* v. *Utah-Idaho R. R.*, 305 U. S. 177; *Gray* v. *Powell*, 314 U. S. 402. On the contrary, the Act which contains the exemption provision provides that actions may be brought in any Court of competent jurisdiction, and this is indicative of the fact that Congress intended in the first instance to vest in the Courts the power to determine what work falls within the exemption.

9. Inso ar as Shapiro is concerned, it is believed that the Court rightfully concluded from the facts before it, that inasmuch as he rode a truck every day, he belonged to the class of employees known as drivers' helpers over whom the Commission itself exercised jurisdiction and of which fact the Court may have taken judicial notice.

for any guidance on the subject for the reason that the Commission, even if it has the power (which is dubious), had not then, and has not yet seen fit to extend its jurisdiction to the class of employees to which the Respondents may belong. In reaching its decision, the Circuit Court was guided only by the Petitioner's lack of proof, which failure it sought to overcome by shifting the burden to the Respondents, but "perplexing as the Petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee." *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 583; 62 Sup. Ct. 1216, 1222.

POINT III.

The Interstate Commerce Commission does not have power to establish qualifications and maximum hours of service for the respondents.

While we believe that the Petitioner's failure to meet its burden of proof is decisive in this case, we are equally convinced that the Respondents did not perform any duties whatever which substantially affected the safety of operation so as to subject them to the jurisdiction of the Commission. Should this Court, however, disagree with our reasoning in this respect, we express with equal vigor our further belief that it was not the intent of Congress to subject to the jurisdiction of the Commission so as to deprive them of the benefits of the Act, those motor carrier employees who spend an unsubstantial part of their time performing duties which do not affect the safety of operation. Bearing in mind that the power of the Commission over motor employees is limited solely to those whose duties affect safety of operation, *U. S. v. American Trucking Assn. Inc.*, 310 U. S. 534, Ex parte No. MC-2 (28 M. C. C. 139),

it would appear from an examination of the stipulated facts that the Respondents do not come under the Commission's jurisdiction. Admittedly, the major part of each work day (*from mornings to late afternoons or early evenings*) was devoted to removing packages from the tail board of the trucks[10] and placing them in the Petitioner's sub-terminal from which they were later removed and delivered by hand or hand-truck. The Petitioner itself concedes that those activities did not affect safety of operation (Pet. brief p. 16), and the Commission [its brief (p. 19) submitted *amicus curiae* in *Levison v. Spector Motor Service*, previously before this Court (No. 139, October Term 1945)], makes the identical concession. Therefore, the only time left during which the Respondents could have performed any service whatever which may have affected the safety of operation was during the hours commencing in the "late afternoon or early evenings" and terminating at the end of the work day.

Of that time (from late afternoons or early evenings to the end of the work day), the greater part was taken up in collecting and picking up from the premises of various manufacturing concerns packages intended for shipment outside of the State of New York and delivering them through the streets of the City by hand-trucks to the Petitioner's waiting trucks. The duties thus performed in collecting packages and delivering them alongside the trucks surely did not affect safety of operation, so that the only time left to be considered is the time spent in lifting the packages from the sidewalk to the tail board of the trucks, and that spent on those occasions when the Respondents, due to the weight or size of the parcel, assisted the loader in stacking it in the body of the truck. In the absence of any enlighten-

10. The driver's helper unloaded the packages from the body of the truck and placed them on the tail board.

ment whatever on the subject, it would appear by simple reasoning that the act of lifting packages from the sidewalk to the tail board of the trucks would no more affect safety of operation than the act of piling the packages on the sidewalk, because safety of operation is not involved until the truck is actually loaded and in operation; however, the Commission, in its report (*Ex parte No. MC-2, 28 MCC 139*), has defined the term "safety of operation" as meaning "the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce, and that alone."

Thus, from the Commissioner's own definition of the term, it would appear that only those activities which directly affect the safety operation of a motor vehicle while it is in operation, such as preparing the vehicle for operation (*mechanical, repairs, adjustments etc.*), loading it with freight (*actually placing freight in the body of the truck in the position in which it is intended to remain during the trip*) and actually operating or assisting in its operation on the highway, would come under the jurisdiction of the Commission. If that be true, it then follows that the physical act of lifting the packages from the sidewalk to the tail board of the truck would not in any manner affect its operation, because such acts did not constitute loading. Purely as an after-thought upon this appeal, the Petitioner refers to the Respondents as loaders, but such reference and designation does not make them loaders. They were not referred to or designated in the agreed statement of facts as loaders and the detailed description of their duties as set forth therein precludes any presumption from arising that they were in fact loaders or performed any duties similar or akin to those performed by loaders.

In those instances where, due to the weight or size of the packages, the Respondents assisted the loaders in stacking

them within the body of the truck, it is fair to presume and it seems to find support in the facts, that their activities in that respect were more or less gratuitous and just as much beyond the scope of their regular employment as it would have been beyond that of a rate clerk who may have sporadically rendered similar assistance.

In any event, it is obvious that whatever assistance the Respondents may have given to the loaders on some few occasions did not substantially affect the safety of operation which the Commission, contrary to its former ruling (*ex parte MC-2*) now urges (*Levison* Case #22, October Term, 1946), is the determining factor rather than the devotion of a substantial part of the working time to such activities. Issue is here taken with the turn-about view which the Commission now expresses, but assume, arguendo, that the assistance which the Respondents gave to the loaders on some remote occasions did substantially affect safety of operation, it would further appear most unlikely that the Commission, even in that case, possessed regulatory power over every employee who, as an incidence to his regular employment, might on some remote occasions be called upon to do or perform some act which did affect safety of operation. By the same token it is difficult to believe that Congress, by Section 13 (b) (1) of the Fair Labor Standards Act intended to exclude from its benefits every employee who might spend an unsubstantial part of his time doing exempt work. The two Acts, intended to correct two different evils, have two different purposes; one has as its purpose the promotion of safe operations whereas the other is designed to correct sub-standard working conditions. Safety of operation would not be promoted by extending the power of the Commission to cover the activities in which these Respondents were engaged, but sub-standard working conditions will result if the Respondents are excluded from

the benefits of the Act and it is here submitted that the exemption was never intended to apply unless the employee comes squarely within the terms of its provisions. In *Phillips* v. *Walling*, 324 U. S. 490, 65 Sup. Ct. 807, this Court said:

> "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and frustrate the announced will of the people."

In other instances similar to the situation here presented, the Courts have consistently adhered to this policy and refused to recognize an exemption where the major part of the employee's work was non-exempt. *Walling* v. *West Ky. Coal Co.*, 153 F. 2d 582; *Walling* v. *Griffin Cartage Co.*, 153 F. 2d 587; *Walling* v. *Morris*, 155 F. 832; *Fletcher* v. *Grinnel Bros.*, 150 F. 2d 337.[11]

No reference is made herein to the Legislative history of the Act, because that subject has been fully covered by the brief which is being submitted by the Solicitor General *amicus curiae*. However, it would appear from a study of such Legislative history that it was not the intent of Congress to include within the exemption provisions of the Act employees who rendered services similar to those rendered by the within Respondents.

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11. The exemption has been held not to apply; where a checker occasionally assisted a loader in placing freight in a truck; *McKeown* v. *Southern California Freight Forwarders*, 52 Fed. Sup. 331; where the exempt work of a night watchman was an incident of his employment; *Green* v. *Riss & Co.*, 49 Fed. Sup. 648; where a painter occasionally worked as a mechanics helper; *Bumpus* v. *Continental Baking Co.*, 1 WH Cases 920; where the major part of the work of a seaman was non-maritime; *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971; Certirari denied, 326 U. S. 722, 66 Sup. Ct. 27.

CONCLUSION

The judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed, and a reasonable sum should be awarded the Respondents for legal services on this appeal.

Dated: October 15, 1946.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 41.—October Term, 1946.

Pyramid Motor Freight Corporation, Petitioner, v. Murray Ispass, Max Granofsky, Harry Brownstein, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 31, 1947.]

Mr. Justice Burton delivered the opinion of the Court.

This case presents two issues:

I. Was it reversible error for the Circuit Court of Appeals to deny petitioner's motion to dismiss the appeal, made on the ground that the appeal had not been docketed and the transcript of record had not been filed within the time specified in Rule 73 (g) of the Federal Rules of Civil Procedure? We hold that it was not.

II. Under the principles we have stated in the companion case of *Levinson* v. *Spector Motor Service*, — U. S. —, was the Circuit Court of Appeals justified in remanding the present case to the District Court for entry of a judgment under the Fair Labor Standards Act, in favor of all of the respondents except Shapiro? We hold that the case should be remanded, but with directions to proceed in accordance with the opinion of this Court in this case and the *Levinson* case. This will include a direction to the District Court to determine whether or not the activities of each respondent consisted, wholly or in substantial part, of the class of work which is defined by the Interstate Commerce Commission in *Ex parte No. MC-2*, 28 M. C. C. 125, 133–134, as that of a "loader" of freight for an interstate common carrier by motor vehicle, and as affecting the safety of operation of motor vehicles in interstate or foreign commerce.[1]

[1] See *Levinson* v. *Spector Motor Service*, *ante*, p. —, note 2.

This action was begun in 1942 in the City Court of the City of New York, pursuant to § 16 (b) of the Fair Labor Standards Act.[2] It sought to recover unpaid overtime compensation for services rendered to the petitioner by each of six of the eight respondents as "a delivery clerk and 'push-boy'," during various periods between October 24, 1938, and September 20, 1941, computed in accordance with § 7 of the Fair Labor Standards Act,[3] together with interest, liquidated damages and an attorney's fee. The case was removed by the petitioner to the United States District Court for the Southern District of New York. The other two respondents there joined in the complaint on like grounds. The petitioner answered that it was an interstate common carrier of freight by motor vehicle; that the labor performed by each of the respondents "consisted primarily of that of [a] driver's helper and of [a] loader;" that, with respect to them, the Interstate Commerce Commission had power to establish qualifications and maximum hours of service pursuant to § 204 of the Motor Carrier Act, 1935, and that, by virtue of § 13 (b) (1) of the Fair Labor Standards Act,[4] § 7 of that Act did not apply to the services of the respondents. The case was submitted to the court upon an agreed statement of facts.[5]

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[2] See *Levinson* v. *Spector Motor Service*, note 6.

[3] See *Levinson* v. *Spector Motor Service*, note 5.

[4] See *Levinson* v. *Spector Motor Service*, note 4.

[5] This included the following description of the work of the respondents as employees of the petitioner:

"Item 3. As to northbound freight the loaded vehicles would come into New York in the very early morning hours to the West 11th Street Terminal where new drivers took charge of the vehicles, and what were called downtown, helpers rode on the vehicles with the drivers to the 38th Street Terminal. At such terminal the doors of the trucks were opened in the mornings, both the driver and downtown helper remaining on the vehicles. *As the downtown helper pushed the freight packages over the tailboards they were received by*

On November 29, 1943, the District Court rendered an opinion in which it declined to determine the status of

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the plaintiffs [respondents], who then placed the freight packages in the subterminal building. Still later in the mornings the plaintiffs [respondents] then delivered the packages to various consignees in the Garment Center, generally using for that purpose what are called hand-trucks or flat trucks, using their own manpower for propulsion.

"During those same days other northbound trucks after first stopping at the West 11th Street main terminal to change a driver and receive a downtown helper, by-passed the West 38th Street subterminal and parked first at one place and then another alongside the curbs in the Garment Center. *At those places the unloading operation was performed in the same way as at the sub-terminal hereinabove described, and the plaintiffs [respondents] then made the deliveries by hand or by hand trucks into the insides of the Garment Center buildings.*

"Item 4. In the late afternoons and early evenings freight originating with various consignors at various locations in the Garment Center was 'picked up' for intended delivery the next morning in Philadelphia or elsewhere south of New York. As to these southbound operations the facts were these: *Some of the freight packages would be picked up by the plaintiffs [respondents] at the consignor's places of business in the Garment Center and hand-trucked by them to the West 38th Street sub-terminal. At that place the plaintiffs [respondents] themselves did, in due course, physically load the freight packages into a waiting truck which, when loaded, took up this journey first to the West 11th Street main terminal, and then with a new driver went on to the destinations south of New York. A downtown employee other than the plaintiffs [respondents] would also at the same time so load the vehicles.*

"Other trucks for southbound loadings took their stations on the public streets in the Garment Center where the plaintiffs [respondents] brought the packages by hand or by hand truck. The part which the plaintiffs [respondents] took in such loading consisted of the lifting of the packages on to the tailboards of the trucks, and very often when the weights or size of the packages so required they would stand inside the truck bodies and, together with the downtown employee, stack and pile the freight in the vehicle.

"Item 5. As to all the plaintiffs [respondents] other than Shapiro they generally walked between stopping points but occasionally rode upon the trucks when the trucks moved from one place to another

the respondents but held the case "open for further action" in order to give the respondents an opportunity to present that question to the Interstate Commerce Commission. 54 F. Supp. 565, 569. Pursuant to respondents' statement that they would not so apply to the Commission and pursuant to their motion requesting a final disposition of the case, the court, on February 14, 1945, dismissed the complaint "without prejudice."[6] 59 F. Supp. 341. After considerable delay in the filing of the record on appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment of dismissal as to the respondent Shapiro on the ground that "he is a 'helper' within the Commission's ruling in 28 M. C. C. at pp. 135, 136." 152 F. 2d 619, 622. As to the other respondents, it reversed the judgment with costs and remanded the cause "for entry of judgment in their favor and for allowance of an attorney's fee." *Id.* at 622. The judgment as to Shapiro has not been questioned and is not before us.

Because of its importance in the interpretation of the Motor Carrier Act and the Fair Labor Standards Act, we granted certiorari, — U. S. —, and the case was argued immediately following the *Levinson* case. A brief on behalf of the Administrator of the Wage and Hour Division,

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in the Garment Center, thereby avoiding loss of time by walking. As to the plaintiff Shapiro, he regularly and as a matter of fixed duty, between August 1939 and September 1, 1941, rode on the truck between four and five hours daily. On the truck at the same time was the driver and a helper from the downtown terminal. In addition thereto the plaintiff Shapiro devoted three and a half hours each day to inside office work at the 38th Street sub-terminal." (Italics supplied.)

[6] The order of dismissal appearing in the record was as follows:

"Ordered that the complaint be and the same hereby is dismissed and that judgment be entered abating and dismissing said action, without prejudice to the rights of plaintiffs [respondents], or any one of them, to bring other actions or proceedings for the establishment of their respective claims, either administratively or at an appropriate time, by action in this court or other proper tribunal."

United States Department of Labor, as *amicus curiae*, was filed jointly in this case and in the *Levinson* case, supporting the position of the respondents.[7]

I.

Notice of appeal, dated March 29, 1945, was filed by the respondents in the District Court April 2, 1945. In spite of the applicable provisions of Rule 73 (g) of the Federal Rules of Civil Procedure,[8] respondents sought

[7] See also, *Walling* v. *Comet Carriers*, 57 F. Supp. 1018, 151 F. 2d 107, 109; cert. granted, 326 U. S. 716; writ of certiorari dismissed on motion of counsel for petitioner Comet Carriers, 328 U. S. 819. That case, also in the Second Circuit, related to "four motor truck drivers, four drivers' helpers and two hand truckers or pushers" employed by Comet Carriers in the transportation of goods between manufacturers and contractors mostly on intrastate trips within or near the New York City Garment Center. As to the hand truckers or pushers, the District Court said: "they are not employed on motor vehicles nor do their functions as employees affect or relate to the safety of operation of the motor vehicles in interstate commerce." 57 F. Supp. 1018, 1023. The Circuit Court of Appeals discussed only the drivers and drivers' helpers. As to them it said:

"Proof that two employees worked only three hours a week in interstate transportation and that two employees made 'some' and 'occasional' deliveries to the warehouses of chain stores and worked the remaining time in the production of goods for commerce does not satisfy the requirement that the amount of time during which they are engaged in interstate commerce be substantial." 151 F. 2d 107, 111.

[8] "RULE 73. APPEAL TO A CIRCUIT COURT OF APPEALS.

"(g) DOCKETING AND RECORD ON APPEAL. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without

from the District Court no extension of time within which to docket their appeal or file a transcript of the record. On July 20, 1945, more than 90 days from the date of the first notice of appeal, respondents, pursuant to motion supported by affidavit, secured from Circuit Judge Augustus N. Hand an order extending to September 1, 1945, the time within which to serve and file their record on appeal. On that date, the transcript of record was filed. The petitioner promptly moved to dismiss the appeal under Rule 73 (a) of the Federal Rules of Civil Procedure,[*] questioning especially the right of a single member of that court to make the order of July 20. This motion was denied October 10, 1945, Circuit Judges Learned Hand, Swan and Clark speaking for the court. The motion was renewed at the hearing on the merits of the appeal and, on December 28, 1945, was denied again, Circuit Judges Learned Hand, Swan and Frank speaking for the court. 152 F. 2d 619. The issue was raised properly and fully presented here.

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motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal." 308 U. S. 752, 28 U. S. C. following § 723 (c).

[*] "RULE 73. APPEAL TO A CIRCUIT COURT OF APPEALS.

"(a) HOW TAKEN. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal." 308 U. S. 745, 28 U. S. C. following § 723 (c).

The authority of a Judge of the Circuit Court of Appeals for the Second Circuit to extend the time for filing the record on appeal appears to be supported by Rule 15 of that court.[10] That Rule, however, was not discussed by counsel and we sustain the action taken by the Circuit

[10] Rule 15, U. S. C. C. A., Second Circuit.

"DOCKETING CASES.

"1. In an appeal in a civil action the appellant shall docket the action and file the record in this court within forty days after filing the notice of appeal with the District Court, or within any added time granted by the district judge within forty days after the filing of the notice of appeal, but in no case later than ninety days after such filing (Rule 73 [g]). . . . *If the record is not presented to the clerk for filing within the periods above provided, he shall refuse to accept it unless this court so orders, or a judge thereof if the court is not sitting.*

"2. This Court will not hear and grant motions for filing and docketing appeals, otherwise properly taken, at times other than as stated in subdivision 1 hereof, except upon a showing by affidavits, or otherwise as the Court may order, (a) that the delay has been due to cause beyond the control of the moving party or (b) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal and (c) in all cases where the district court has power to act, that an extension of time has been denied by that court, together with the grounds for such denial, if any are stated.

"3. If the appellant shall have failed to comply with this rule, any appellee may either docket the action and file the record in this Court, in which event it shall stand for argument, or may have the action docketed and dismissed by the Clerk of this Court upon producing a certificate from the Clerk of the Court wherein the judgment or decree was rendered, certifying that such appeal has been duly taken or allowed, and proof that four days' notice in writing has been served on the appellant or his attorney that application will be made to the Clerk of this Court for such dismissal. No action dismissed under this rule shall be reinstated except in the discretion of the Court, and upon a showing similar to that required under subdivision 2 hereof." (Italics supplied.) 11 U. S. Sup. Ct. Rep. Digest, L. Ed., Supp. No. 4, p. 55.

Court of Appeals under authority of Rule 73 (a), even without reference to its own Rule 15.

The principal argument against the final action of the Circuit Court of Appeals on this motion is based upon the following statement in that court's opinion: "In the case at bar there was no abuse of discretion in extending the time, *despite the somewhat feeble excuses for delay, since the appeal presents a substantial question as to the correctness of the judgment.*" (Italics supplied.) 152 F. 2d 619, 621. It is urged that this shows that the court based its refusal to dismiss the appeal on the substantiality of the question to be presented on the merits of the appeal, rather than on the substantiality of the excuses for the delay in filing the record.

We interpret the statement as no more than a recognition by the court that the substantiality of the question to be at issue on the merits of the appeal was a matter appropriate for its consideration under Rule 73 (a), in connection with all the other circumstances before it. Rule 73 (a) is intended to place reliance upon the sound discretion of the Circuit Court of Appeals. We see no reason to question the discretion exercised in this case as evidenced by the agreement of all of the five Circuit Judges to whom the issue was presented. *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83; *Mutual Benefit Health & Accident Ass'n* v. *Snyder*, 109 F. 2d 469; *Burke* v. *Canfield*, 111 F. 2d 526; *United States* v. *Gallagher*, 151 F. 2d 556.

Accordingly, we sustain the denial of the motion to dismiss the appeal under Rule 73 (a).

II.

On the merits, the question is whether or not the Circuit Court of Appeals was justified in remanding this case with instructions to enter a judgment under the Fair Labor Standards Act in favor of all of the respondents except

Shapiro. We hold that the cause should be remanded but that the order of remand should be modified. This case was tried, without a jury, entirely upon an agreed statement of facts and a pre-trial agreement between the parties, approved by the District Court, settling the issues to be determined. For the sake of clarity, we have proceeded on the same basis and have treated the case as though, upon remand of it to the District Court, that court will proceed upon the same record. This, however, should not be interpreted as necessarily restricting that court to that record if, for good cause, that court should find it advisable to retry the case *de novo*.[11]

Under the agreed statement there was no question but that the Fair Labor Standards Act applied to each respondent provided only that he was not found to have been excluded from the overtime pay requirements of that Act by § 13 (b) (1) because of being an "employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . . ." 52 Stat. 1068, 29 U. S. C. § 213 (b) (1). There thus will remain to be determined by the District Court the question whether the activities of the respective respondents

[11] The District Court, in its order of February 14, 1945, described the basis on which the case had been tried as follows:

". . . on the 3rd day of May, 1943, and the parties hereto having duly appeared by their respective attorneys, and submitted to the Court, in lieu of the offering of proof, an agreed statement of facts setting forth the issues framed by the complaint, and the Court, upon the consent of the attorneys for the respective parties, having thereupon made and entered an order herein on the said 3rd day of May, 1943, wherein and whereby the said agreed statement of facts which were submitted by the attorneys for the respective parties, as aforesaid, was set forth as the issues framed by the complaint and answer, and the said action having been submitted to the Court for its determination upon the said agreed statement of facts and order hereinbefore mentioned and referred to, ..."

consisted, either wholly or in substantial part, of the class of work which is defined by the Interstate Commerce Commission in *Ex parte No. MC–2*, 28 M. C. C. 125, 133–134, as that of a "loader," and as affecting the safety of operation of motor vehicles in interstate or foreign commerce.[12]

It will remain for the District Court to apply the facts found by it as to the activities of the respective respondents to the classifications of work that have been made by the Interstate Commerce Commission, defining what comes within the jurisdiction of the Commission under § 204 of the Motor Carrier Act. The Commission has defined its jurisdiction, both affirmatively and negatively, as follows:

> ". . . we have power, under section 204 (a) of said part II, to establish qualifications and maximum hours of service for the classes of employees covered by findings of fact numbered 1, 2, and 3 above [mechanics, loaders and helpers], and . . . we have no such power over any other classes of employees, except drivers." *Ex parte No. MC–2*, 28 M. C. C. 125, 139.[13]

Under these circumstances, there is no occasion for us to refer to the Commission any question presented in this case nor to suspend the long delayed final judgment pending further findings by the Commission. The Commission has done its work. The District Court must determine simply whether or not the respective employees who seek to recover overtime compensation under § 7 are excluded from the benefits of that Section because they are within the above classification. The special knowledge and experience required to determine what classi-

[12] See *Levinson* v. *Spector Motor Service*, note 2.

[13] The findings of fact referred to by the Commission, insofar as they relate to loaders, are those quoted in the text of *Levinson* v. *Spector Motor Service*, at note 17.

fications of work affect safety of operation of interstate motor carriers have been applied by the Commission. The determination whether or not an individual employee is within any such classification is to be determined by judicial process.

The District Court, in applying § 204 of the Motor Carrier Act to respondents, will determine whether or not the activities of each respondent, either as a whole or in substantial part, come within the Commission's definition of the work of a "loader." In determining whether the activities, or any substantial part of the activities, of an individual come within those of such a "loader," the District Court shall not be concluded by the name which may have been given to his position or to the work that he does, nor shall the District Court be required to find that any specific part of his time in any given week must have been spent in those activities. The District Court shall give particular attention to whether or not the activities of the respective respondents included that kind of "loading" which is held by the Commission to affect safety of operation. In contrast to the loading activities in the *Levinson* case, the mere handling of freight at a terminal, before or after loading, or even the placing of certain articles of freight on a motor carrier truck may form so trivial, casual or occasional a part of an employee's activities, or his activities may relate only to such articles or to such limited handling of them, that his activities will not come within the kind of "loading" which is described by the Commission and which, in its opinion, affects safety of operation. See also, *McKeown v. Southern California Freight Forwarders*, 49 F. Supp. 543. Except insofar as the Commission has found that the activities of drivers, mechanics, loaders and helpers, as defined by it, affect safety of operation, it has disclaimed its power to establish qualifications or maximum hours of service under § 204 of the Motor Carrier Act.

If none of the alleged "loading" activities of the respective respondents, during the periods at issue, come within the kind of activities which, according to the Commission, affect the safety of operation of motor vehicles in interstate or foreign commerce within the meaning of the Motor Carrier Act, then those respondents of which that is true are entitled to the benefits of § 7 of the Fair Labor Standards Act. On the other hand, if the whole or a substantial part of such alleged "loading" activities of the respective respondents, during the periods at issue, do come within the kind of activities which, according to the Commission, affect such safety of operation, then those respondents who were engaged in such activities are excluded from the benefits of such § 7. If some, but less than a substantial part, of such activities of the respective respondents, during some or all of the periods at issue, come within the kind of activities which, according to the Commission, affect such safety of operation, then the right of those respondents who were engaged in such activities to receive the benefits of § 7 of the Fair Labor Standards Act does not come within the precise issue determined in the *Levinson* case and this Court reserves its decision as to the power of the Commission to establish qualifications and maximum hours of service with respect to them and, consequently, reserves its decision as to their right to receive the benefits of § 7 of the Fair Labor Standards Act.

For these reasons, the judgment of the Circuit Court of Appeals is vacated insofar as it relates to the respondents other than Shapiro, and the cause is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.